Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

October Term, 1976
No. 76-1652

MOUNT WILSON F.M. BROADCASTERS, INC.,
*Petitioner,*

*vs.*

ROBERT L. FOX and IRA LAUFER,
*Respondents.*

**On Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District, Division Two.**

## BRIEF FOR RESPONDENTS IN OPPOSITION.

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June 23, 1977

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ROBERT L. FOX and IRA LAUFER,
*Respondents.*

**On Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District, Division Two.**

## BRIEF FOR RESPONDENTS IN OPPOSITION.

Respondents Robert L. Fox and Ira Laufer respectfully submit that the Petition for Writ of Certiorari of Petitioner Mount Wilson F.M. Broadcasters, Inc., should be denied: (1) the state court judgment rests on the adequate non-federal ground that the illegality of the sales representation contract under the *Golden West* principle was improperly raised for the first time in Petitioner's reply brief on appeal, (2) no federal question is presented because there is no evidence in the record to support the claim of illegality, the only evidence relied on by Petitioner to support the claim being outside the record, and (3) the *Golden West*

principle, which prohibits cross-interests in radio stations serving the same community, has no application where the radio stations serve separate communities and markets 80 miles apart.

**Jurisdiction.**

Petitioner may not invoke the jurisdiction of this Court under 28 U.S.C. §1257(3) because the judgment of the state court rests on an adequate non-federal ground. Under state law, Petitioner was precluded from questioning the legality of the sales representation contract for the first time in its reply brief on appeal. Moreover, the specious issue was based on "evidence" never offered in the trial court.

**Questions Presented.**

Petitioner first raised the issue of illegality of the sales representation contract under the *Golden West* principle in its reply brief in the California Court of Appeal based on evidence outside the trial record. The California Supreme Court denied a hearing on the appeal without opinion, presumably on the adequate non-federal ground that state law requires such issues to be raised and litigated in the trial court. Is Petitioner precluded from seeking jurisdiction of this Court to consider this untimely and unlitigated issue?

The *Golden West* principle prohibits cross-interests in radio stations serving the same community. Does a cross-interest in radio stations which serve separate communities and markets 80 miles apart violate the *Golden West* principle?



**ARGUMENT.**

**I**

**The State Court Judgment Rests on the Adequate Non-Federal Ground That the Illegality of the Contract Under the "Golden West" Principle Was Not Timely Raised.**

Petitioner never questioned the legality of the sales representation contract under the *Golden West* principle until its reply brief in the California Court of Appeal. (Petition, p. 4.) The Court rejected the belated contention. (Appendix C to Petition, p. 56a.) Petitioner again raised the issue on application for hearing before the California Supreme Court. (Appendix B to Petition, pp. 43a-51a.) That Court denied the application without opinion. The California Supreme Court denied a hearing presumably on the adequate non-federal ground that under state law such issues must be raised and litigated in the trial court (*Everly Enterprises v. Altman* (1960) 54 Cal.2d 761, 765, 8 Cal.Rptr. 455, 356 P.2d 199) and may not be raised for the first time in a reply brief on appeal. (*Kahn v. Wilson* (1898) 120 Cal. 643, 644, 53 Pac. 24.)

To merit consideration by this Court, federal questions must be seasonably raised in accordance with requirements of State law. (*Edelman v. California* (1953) 344 U.S. 357, 358, 97 L.Ed. 387, 73 S.Ct. 293.) Petitioner failed to seasonably raise the issue of the legality of the sales representation contract in accordance with requirements of California law.

*Stembridge v. Georgia* (1952) 343 U.S. 541, 96 L.Ed. 1130, 72 S.Ct. 834, is exactly in point. In that case, the petitioner raised a federal question for

the first time in an application for rehearing in the state intermediate appellate court. The court considered the federal question but denied the application for rehearing. The state's highest court denied a hearing without opinion on the federal question. The United States Supreme Court dismissed the case on grounds that the Petition for Certiorari was improvidently granted. The Court concluded that, because the denial of a hearing on the federal question by the state's highest court could have rested on the adequate state ground of failure to timely raise the federal question in the trial court, the Supreme Court would decline jurisdiction to review the judgment. The fact that the state intermediate appellate court considered the federal question, the Court explained (343 U.S. at 547-548),

> "does not, in our view, change the posture of this case—it does not remove the strong possibility, in light of Georgia law, that the Supreme Court of Georgia might have rested its order on a non-federal ground. We are without jurisdiction when the question of the existence of an adequate state ground is debatable."

In the instant case, as in *Stembridge*, the federal question was never raised in the trial court and was untimely raised in the intermediate state appellate court. Although the intermediate appellate court considered the federal question, the state's highest court rejected an application for hearing on the federal question without opinion.

Certiorari should be denied on the ground that the state court judgment rests on an adequate non-federal ground.



## II

## No Federal Question Is Presented Because the Only Evidence Relied on by Petitioner to Support Its Claim of Illegality Is Outside the Record.

Petitioner bases its claim that the sales representation contract violated the *Golden West* principle on the assertion that the broadcast signal contours of the two radio stations partially overlapped. (Petition, pp. 8-9.) Not a shred of evidence was introduced at trial to support this assertion.

The source and accuracy of the chart of "coverage contours", referred to in the Petition (Appendix F to Petition, pp. 63a-65a) is unknown. The chart was not in evidence in the trial court, was not in evidence before the California Court of Appeal, and was not in evidence before the California Supreme Court. Under well-settled rules of California procedure, appeals must be confined to the facts in the trial record. (*Loving & Evans v. Blick* (1949) 33 Cal.2d 603, 613-615, 204 P.2d 23.) And under United States Supreme Court rules, evidence outside the record will not be considered. (*New Haven Inclusion Cases* (1970) 399 U.S. 392, 450, fn. 66, 26 L.Ed.2d 691, 90 S.Ct. 2054.)[1]

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[1]In its reply brief in the California Court of Appeal, Petitioner cited an exhibit which was admitted at trial solely for the purpose of establishing the continuing contractual relationship between Petitioner and Respondents. (Exhibit 8, C.T. 617-618, R.T. 148-149.) Petitioner could not, then or now, rely on the exhibit as proof that the broadcast signal contours of the radio stations overlapped. The exhibit, mere advertising puffery, was never offered to show, or authenticated as showing, the broadcast signal contour of Petitioner's radio station, nor did it purport to show the contour of the other radio station. Both California and Federal law rejects the use of evidence, admitted at trial to prove one fact, to establish on appeal an entirely different fact. As Mr. Justice Cardozo ex-

(This footnote is continued on next page)

Certiorari should be denied because nothing in the record supports Petitioner's claim that this case presents a federal question.

III

**The "Golden West" Principle, Which Prohibits Cross-Interests in Stations Serving the Same Community, Has No Application to Stations Serving Separate Communities and Markets 80 Miles Apart.**

Even if the California courts considered evidence outside the trial record, which they did not, and even if Petitioner timely raised the federal question of illegality of the contract, which it did not, nevertheless it is clear that the contract between Petitioner and Respondents does not violate the principles stated by the Federal Communications Commission ("FCC") in *Golden West Broadcasters* (1969) 16 F.C.C.2d 918.

*Golden West* involved a contract for sales representation of one radio station by the owner of another radio station in the same community. The FCC concluded that such a contract could lessen competition and would therefore violate the FCC's policy of promoting competition between radio stations. The FCC has never declared the *Golden West* principle applicable where stations are licensed for widely separated communities, much less where, as here, the stations are 80 miles apart and service entirely different markets. The decisions relied on by Petitioner, *Sudbrink Broadcasting, Inc.* (1973) 42 F.C.C.2d 271, and *First Illinois Cable TV, Inc.* (1973) 43 F.C.C.2d 1125, both involved stations in adjoining cities providing primary service to the same market.

The FCC has refused to harden the *Golden West* principle into an unbending rule. The FCC considers the circumstances of each case. In its recent decision, *Combination Advertising Rates and Other Joint Sales Practices* (1976) 59 F.C.C.2d 894 (Appendix A to the Petition, pp. 32a-42a), the FCC states (at paragraph 16):

> "[W]e do not believe that contours or any suggested substitute would be suitable for representing the areas served by a station in view of the manner in which broadcast time is sold. Accordingly, we conclude that no rule will be adopted and that contours will not be used in regard to the policies set out in the *Golden West* case or the extension thereof."

Thus, even with reference to evidence outside the record which purports to show a partial overlap of broadcast signal contours, Petitioner fails to show a violation of the *Golden West* principle. The two radio stations, KVEN in Ventura, and KBCA in Los Angeles,

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plained in *Shepherd v. United States* (1933) 290 U.S. 96, 103, 78 L.Ed. 196, 54 S.Ct. 22:

> "A trial becomes unfair if testimony thus accepted [for one purpose] may be used in an appellate court as though admitted for a different purpose, unavowed and unsuspected . . . ."

The California Supreme Court similarly refuses to consider evidence, offered solely to prove one fact, as proof of another fact. *Trafton v. Youngblood* (1968) 69 Cal.2d 17, 32, 69 Cal.Rptr. 568, 442 P.2d 648, explains (emphasis in original):

> "As we said . . ., 'It is frequently the case that evidence which is admissible to establish one issue may tend to establish another. . . . *If the other issue that the evidence may tend to establish is not before the court the evidence must be limited to the actual issue.* The fact of its introduction cannot be used to establish an issue that the parties have not made in their pleadings. *The Court would not be authorized to consider it as establishing an issue that was not before it for trial.*' "

do not serve the same city, or even nearby cities, or the same area or market, nor is there a substantial overlap of broadcast signal contours.

In addition, Petitioner advised the FCC of the existence of this litigation and the sale representation contract at the time of the application for renewal of KVEN's license. A letter from the FCC to KVEN shows that the FCC considered this lawsuit in determining to renew KVEN's license. (Appendix A to this Brief in Opposition.) The FCC found nothing improper in this aspect of the sales representation contract. Presumably the FCC is aware of its own policies, rules and regulations, and if it found the contract improper it would have said so.

In light of the FCC's full knowledge of the sales representation contract and the patent validity of the contract under the *Golden West* principle, Petitioner's belated attempt to question the propriety of the contract under FCC rules is groundless, wasteful, and should be rejected.

**Conclusion.**

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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ELLIS J. HORVITZ,
MARC J. POSTER,

*Attorneys for Respondents*
*Robert L. Fox and Ira Laufer.*

June 23, 1977

**APPENDIX.**

UNITED STATES OF AMERICA
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

I, Vincent J. Mullins, hereby certify that the attached is a true and correct copy of the following document on file in this Commission, and that I am official custodian of the same:

> A letter to KVEN Broadcasting Corporation, Ventura, California from the Commission's Broadcast Bureau dated August 8, 1975.
>
> IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of the Federal Communications Commission to be affixed, this fifth day of November, 1976.
>
> /s/ Vincent J. Mullins
> Secretary

[Seal]

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
August 8, 1975

CERTIFIED AIR MAIL—RETURN RECEIPT REQUESTED

KVEN Broadcasting Corporation
Radio Station KVEN and KHAY (FM)
P.O. Box 699
Ventura, California 93001

Attention: Robert L. Fox, President

Gentlemen:

This is in reference to your applications for renewal of license of Stations KVEN (BR-2069) and KHAY-FM (BRH-1425), Ventura, California.

As you are aware, information concerning your renewal has been brought to the Commission's attention by Mount Wilson FM Broadcasters, Inc. (licensee of KBCA, Los Angeles, California). Mount Wilson alleges, in substance, that the principals of KVEN Broadcasting Corporation (Messrs. Fox and Laufer) concealed from the Commission certain facts pertaining to a relationship between themselves and KPRO, Inc. (licensee of Radio Station KPRO, Riverside, California). More specifically, Mount Wilson alleges that: (1) Fox and Laufer acquired an ownership interest in KPRO prior to September 1, 1970 and KVEN failed to notify the Commission within 30 days as required by the Commission's Rules; (2) Fox and Laufer became vice presidents of KPRO, Inc. on March 15, 1971 and KVEN concealed the fact from the Commission by failing to report it in its 1971 renewal application or in subsequent ownership reports; and,



(3) Fox and Laufer became stockholders of KPRO, Inc. between July 19 and October 12, 1972 and KVEN did not notify the Commission within 30 days as required.

We have carefully reviewed the Commission's records for KVEN and KPRO in light of Mount Wilson's allegations and your response to those allegations. The results of that review and our conclusions are set out below. Mount Wilson alleges that on or about September 1, 1970 Robert Fox informed Saul Levine (President of Mount Wilson FM Broadcasters, Inc.) that he (Fox) and Laufer had acquired an ownership interest in KPRO, Inc. and that Fox repeated the statement more "recently" to Saul Levine's attorney. It is further alleged, that a letter signed by Robert Fox, dated November 20, 1970, is contained in the files of Station KPRO which states, in part, "Ira Laufer and I (Fox) have taken over as chief operating officers of KPRO effective October 1, 1970. Furthermore, we have taken an ownership interest in the station. . ." In reply, you complain that the Mount Wilson allegations are an attempt to harass KVEN because of pending civil litigation in the California State Courts between Mount Wilson and Fox and Laufer. You state KPRO and Laufer entered into an employment agreement September 1, 1970 but that the contract did not provide for stock ownership. You further state there was an oral understanding that KPRO, Inc. was to be re-incorporated and that on completion of the re-incorporation Fox and Laufer would be given the right to purchase 10% (5% each) of the common stock of KPRO, Inc. In addition, you explain that neither Fox nor Laufer are lawyers and the use of the term "ownership interest" by Fox was based on his understanding

of what his interest would eventually be and not on any legal right he actually had.

The record shows no provision in the Fox-Laufer non-exclusive employment agreements of September 1, 1970 for either a percentage of the profits and/or a sharing of the losses. Thus, these agreements were not required (by Section 1.613 of the rules) to be filed with the Commission. The record also indicates the oral "understanding" was set out in writing September 21, 1970 in the form of a "deal points" summary from KPRO's legal counsel to its principals. The summary shows that Fox and Laufer would be permitted to purchase 10% of the common stock of "the company." However, the sale was contingent on the re-incorporation of KPRO, the resolution of certain legal and tax questions, and the concurrence of KPRO's principals. When considered in full light of the questions involved and the two years it took to draw forth a final agreement from the understanding, it does not appear that Fox and Laufer acquired, prior to July 19, 1972, any interest in KPRO which KVEN was required to report to the Commission. In addition, The Superior Court of the State of California for the City of Los Angeles rendered a judgment, April 4, 1975, which is relevant to this issue. Specifically, in the matter of *Robert L. Fox and Ira Laufer v. Mount Wilson F.M. Broadcasters, Inc., et al.*, No. C27123 the court held, in pertinent part:

> Under the terms of the employment agreement between Plaintiffs (Fox and Laufer) and radio station KPRO, entered into in 1970, plaintiffs did not acquire either an ownership interest or stock position in said radio station KPRO. . . .



> Plaintiffs did not acquire stock or own stock in radio station KPRO, Riverside, until September 27, 1972, and plaintiffs did not enter into an agreement to purchase stock in KPRO until July 19, 1972.

Mount Wilson also alleges that Fox and Laufer became vice presidents of KPRO, Inc. March 15, 1971, and that KVEN concealed this fact from the Commission by failing to report it in its 1971 renewal application filed September 1, 1971 or in ownership reports filed October 6, 1971 and February 1, 1973. The record shows that Fox and Laufer were elected on March 15, 1971 as "part time" vice presidents of KPRO, Inc., in charge of sales and station operation, respectively. The position of "part time" vice president did not confer on either Fox or Laufer any control of KPRO, Inc. and thus, did not constitute a change which KVEN, Inc. was required to report to the Commission.

Mount Wilson further alleges that Commission records for KPRO, filed October 16, 1972 show Fox and Laufer as 10% owners of KPRO's common stock, but these records for KVEN also indicate that the first time KVEN informed the Commission of the Fox-Laufer stock holdings in KPRO, Inc. was by ownership report filed January 4, 1974. In addition Mount Wilson alleges ownership reports for KVEN filed October 6, 1971 and February 1, 1973 and the 1971 renewal application specifically denied any broadcast interests (except KVEN) for Fox and Laufer. Therefore, it is averred, the information was concealed.

The record shows that KPRO, Inc. and Fox and Laufer consummated an agreement July 19, 1972 which, in substance, provided for the future purchase of KPRO

stock by Fox and Laufer. The agreement was expressly conditioned on the prior approval of the sale of the securities by the California State Commissioner of Corporations. An ownership report filed October 16, 1972 for KPRO shows the actual transfer of the stock occurred September 27, 1972. Section 1.615(a) of the Commission's Rules requires each licensee of a commercial broadcast station to file an ownership report when the application for renewal of station license is required to be filed. The name, stockholdings of officers, directors and stockholders, among other things, must be reported. In addition, Section 1.615(c) requires, in part:

> (c) A supplemental Ownership Report (FCC Form 323) shall be filed by each licensee or permittee within 30 days after any change occurs in the information required by the Ownership Report from that previously reported. . .

Thus, the agreement of July 19, 1972 and the actual stock transfer September 27, 1972 were changes which KVEN was required to report. The fact that the information was on file with the Commission (in KPRO's license file) does not alleviate KVEN's duty to comply fully with the reporting requirements of the rules. In addition, your failure to report, on the 1971 renewal application, that Fox and Laufer were officers of KPRO, Inc., demonstrates a lack of prudence. While not in violation of the strict letter of the rules, neither does it meet the spirit of the Commission's Rules.

The Communications Act requires the Commission to determine, in the case of each application filed with it, whether the public interest, convenience, and necessity will be served by a grant of that application.



We believe we can make that determination here without further administrative inquiry. We note particularly that the required information was available in the Commission's files through submission by KPRO. However, your failure to comply with the reporting requirements of the Commission's rules cannot be condoned. A copy of this letter will be placed in KVEN's permanent record file at the Commission and your strict adherence to the rules in the future will be expected.

Sincerely yours,

/s/ James R. Hobson
For Richard J. Shiben
Chief, Renewal & Transfer Division
Broadcast Bureau

cc: James A. Gammon, Esq.
A. Harry Becker, Esq.